

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





To be argued by  
Jerome F. O'Neill

Docket No.

**77-1218**

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

*B  
p/s*

UNITED STATES OF AMERICA

Appellee

v.

DANIEL BICHARA ZOGBI

Appellant

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Appeal from the United States District  
Court for the District of Vermont

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BRIEF FOR THE UNITED STATES



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IN THE  
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Appellee

v

DANIEL BICHARA ZOGBI

Appellant

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BRIEF FOR THE UNITED STATES

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STATEMENT OF THE CASE

Daniel Bichara Zogbi appeals from a judgment and conviction entered on April 11, 1977 after a two-day trial before the Honorable Albert W. Coffrin, United States District Judge, and a jury.

An indictment bearing criminal number 76-79 and filed on February 17, 1977 charged Daniel Bichara Zogbi in five counts as follows:

Count I charged Zogbi with rescuing and dispossessing and attempting to rescue and dispossess a 1976 Pontiac Trans Am from officers of the United States Customs Service after the vehicle had been taken detained and seized by those officers, in violation of 18 U.S.C. §§ 2, 2233;

Count II charged Zogbi with theft of a 1976 Pontiac Trans Am which was the property of the United States and was valued at in excess of \$100, in violation of 18 U.S.C. § 641;

Count III charged Zogbi with removing merchandise, to wit, a 1976 Pontiac Trans Am from the custody and control of the United States Customs Service, in violation of 18 U.S.C. § 549;

Count IV charged Zogbi with transportation in foreign commerce of a 1976 Pontiac Trans Am knowing the same to have been stolen, in violation of 18 U.S.C. §§ 2, 2312;

Count V charged Zogbi with conspiring with Byron Kennedy to commit the crimes set out in Counts I through IV of the indictment, in violation of 18 U.S.C. § 371.

Prior to the commencement of trial on April 5, 1977 the Government dismissed Count II of the indictment. (TRI 3)<sup>\*</sup> The Government dismissed Count V at the conclusion of its case (TRII 14) and the court granted the defendant's Motion for Judgment of Acquittal after the Government rested as to Count I. (TRII 14-15) The jury returned a guilty verdict on Counts III and IV on April 6, 1977. (TRII 57-58)

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\* TRI refers to the first of two volumes of transcript. Other references are: TRII for the second transcript volume, DB - Defendant's Brief, DA - Defendant's Appendix, GX - Government Exhibit.



On April 11, 1977 Judge Coffrin sentenced Zogbi to one year in the custody of the Attorney General, the execution of the sentence was suspended with the exception of 60 days and Zogbi was placed on probation for a period of three years to commence upon his release from confinement. The sentence as to each count is concurrent as to each other and as to an identical sentence imposed in D. Vt. Cr. No. 76-60 (CA No. 77-1217). Zogbi's bail was continued pending appeal.

STATEMENT OF ISSUES

WHETHER THE COURT COMMITTED REVERSIBLE ERROR  
IN ADMITTING GOVERNMENT EXHIBITS TWO AND THREE.



STATEMENT OF FACTS

In the light most favorable to the Government, United States v. Marrapese, 486 F.2d 918, 921 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974), the jury could have found the following facts.

On July 29, 1976 Daniel Bichara Zogbi was in possession of a 1976 Pontiac Trans Am at the Port of Entry from Canada at Highgate Springs, Vermont. (TRI 12, 13) U.S. Customs Agent Frank J. Kopeski, Jr. seized the vehicle and its contents and informed Zogbi that "it [the vehicle] was under seizure as was the merchandise in the vehicle." (TRI 10-14, 15; DA 18) Special Agent Kopeski turned the vehicle over to Customs Supervisory personnel at Highgate Springs who placed the vehicle in the impound lot, which is a separate grassed in area away from the Customs house. (TRI 15, 24)

Zogbi had contact with Special Agent Richard Mercier of the U.S. Customs following the seizure and indicated on numerous occasions that he wanted to get the automobile back.\* (TRI 127) On September 22, 1976 Zogbi entered the United States with an individual by the name of Byron Kennedy at the Port of Entry at Champlain, New York and

\* Zogbi came to the port of entry at Highgate Springs between the time of the seizure of the automobile on July 27 and its disappearance on September 23 and asked to look for a key chain in the automobile. (TRI 43-44) He was allowed to do so and also was allowed to drive the car around the area with a Customs Inspector following which the vehicle was locked up and the keys returned to the Supervisory Customs Inspector. (TRI 45-46)



proceeded to his lawyer's office in Plattsburg, New York. (TRI 55, 72-73, 99-100, 129-30) In the early morning hours of the next day, September 23, Zogbi and Kennedy again entered the United States. (TRI 62-63, 74-76, 99-100) Although Zogbi indicated to the Customs Inspector that he and Kennedy were going to New York City, they in fact did not go there. (TRI 65-66, 74-76, 99-100)

The 1976 Pontiac Trans Am seized from Zogbi on July 29, 1976 was observed in U.S. Customs custody at Highgate Springs on September 22, 1976 at 3:30 P.M. and was missing as of 7:00 A.M. on September 23, 1976. (TRI 47-48)

Zogbi was observed in possession of the car at his home in Montreal on September 26, 1976 by Constables LaFortune and LaFleur of the Montreal Urban Community Police Department and Corporal Allan Lockwood of the Royal Canadian Mounted Police. (TRI 84-86, 91-93, 95) Corporal Lockwood and Sergeant Detective Lewis of the Montreal City Police questioned Zogbi on that date and Zogbi indicated that he had not been in the United States on either September 22 or September 23 but had noticed the vehicle out in front of his house with the keys in it on September 23 at approximately 10:00 A.M. (TRI 94-97) Zogbi indicated that the vehicle had been seized by U.S. Customs on July 29, 1976 and was being held in lieu of a \$1,000 penalty. (TRI 97) On

October 1, 1976 Corporal Lockwood interviewed Byron Kennedy and on that date received a phone call from Zogbi who indicated that he and Kennedy had been in the United States on September 22-23, 1976 on two occasions but had gone back into Canada through the Port of Entry at Champlain, New York. (TRI 98-100)

Zogbi was arrested on this charge on October 13, 1976 and prior to his appearance before the magistrate several law enforcement officers heard him state that apparently someone had seen him take the car. (TRI 104, 112, 127)



ARGUMENT

THE COURT DID NOT COMMIT REVERSIBLE ERROR IN  
ADMITTING GOVERNMENT EXHIBITS TWO AND THREE.

1. Government Exhibits Two and Three Were  
Admissible Under Rule 1003 of the Federal  
Rules of Evidence
- 

Rule 1003 of the Federal Rules of Evidence [hereinafter  
FRE] provides:

A duplicate is admissible to the same extent  
as an original unless (1) a genuine question  
is raised as to the authenticity of the  
original or (2) in the circumstances it would  
be unfair to admit the duplicate in lieu of  
the original.

During the trial of this case the Government established  
that GX 2 (DA 7) when read together with GX 3 (DA 8)  
constituted a reconstructed copy of the letter sent out to  
Zogbi after the seizure of the automobile in his possession  
on July 29, 1976. (TRI 31-35)

While an objection to the admission of GX 2 and 3 was  
made during the trial, the objection did not indicate that  
there was any question as to the authenticity of the  
reconstructed copy nor that it would be unfair to admit  
the duplicate in lieu of the original.\* Further, recent

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\* Defendant's objection was as follows:

Your honor, I object to this being introduced  
into evidence. I don't feel any ground work  
has been laid to show this letter was actually  
sent to the defendant in the case.

TRI 34

authority suggests that a reconstructed copy such as was used here should be admitted. J. Weinstein & M. Berger, Weinstein's Evidence ¶ 1003[03] 1003-13 to -14 (1976)

[hereinafter Weinstein's Evidence]:

In a case such as Givens where the printed blank form is offered with the carbon of the typed portion so that the entire document can be read, the two should be admitted as a reconstructed duplicate.

This reasoning is entirely consistent with the theory behind Rules 1001 - 1004:

When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), supra, a "duplicate" possesses this character.

Notes of Advisory Committee on Proposed Rules.

Carbon or photostatic copies of documents have been held admissible in circumstances where there was no real claim that the copy was inaccurate. See CTS Corp. v. Piher International Corp., 527 F.2d 95, 103-04 (7th Cir. 1975); United States v. Rodriguez, 524 F.2d 485, 487-88 (5th Cir. 1975); Diplomat Homes Inc. v. Commercial Stand. Ins., Co., 394 F. Supp. 558, 565 (W.D. Mo. 1975)



2. Government Exhibits Two and Three Were  
Admissible Under Rule 406

In addition to the sufficient grounds for admission shown under Rule 1003, the carbon and form were admissible under FRE 406:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

U. S. Customs Supervisory Inspector Robert K. Cyr testified that GX 2 was made up as part of the routine practice of U.S. Customs to notify an individual of the seizure of the vehicle (TRI 31-35). The routine practice contemplated by Rule 406 as applied to business is quite broad and would encompass the facts set out here as well as covering the mailing of the letter even on the limited evidence introduced on this point in the District Court. See Weinstein's Evidence ¶ 406 [03].

While defendant now claims that the Government should not have been permitted to introduce GX 2 and 3 as duplicates of the original, and should have been required to produce the originals, this objection was not made below. Since the objection was not framed in this manner, the Government

made no inquiry of its witness on this point. In the trial context however the obvious conclusion is that the Government did not have the original since it had been mailed to Zogbi.

3. The Government Did Not Have to Establish That Zogbi Was Aware That The Vehicle Had Been Seized To Prove Count IV of The Indictment

Although defendant attempts to suggest otherwise, it also must be noted that the Government did not have to prove that the vehicle had been seized for purposes of Count IV (transportation in foreign commerce of a motor vehicle knowing it to have been stolen). Rather, the Government had only to establish that the automobile was lawfully in the custody of U.S. Customs and that it was taken without the consent of U.S. Customs by a person who had the intent to deprive U.S. Customs of ownership or lawful right of possession of the car. (TR II 49-50) See United States v. Zepin, 533 F.2d 279 (5th Cir. 1976). For this reason the conviction on Count IV must stand irrespective of the merits of defendant's arguments that GX 2 and 3 should have been excluded.

4. Even If Error Had Been Committed, It Was Harmless

Lastly, Zogbi was told by Special Agent Kopeski on July 29, 1977 that the automobile was being seized, and



Zogbi thereafter told Corporal Lockwood of the RCMP that the vehicle had been seized by U.S. Customs. (TRI 15, 97) Thus, even if GX 2 and 3 had been inadmissible, their admission does not require reversal even under the standard applicable to constitutional errors since it was harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 22-24 (1967), and under the less strict standard applicable here, non-constitutional error, the defendant certainly has failed to show that the "error" here substantially swayed the judgment. Kotteakos v. United States, 328 U.S. 750, 765 (1946).

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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the District of Vermont  
Attorney for the United  
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Of Counsel

August 29, 1977



IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

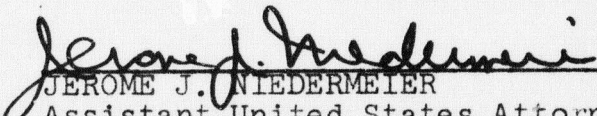
Docket No. 77-1218

v.

DANIEL BICHARA ZOGBI

CERTIFICATE OF SERVICE

I hereby certify that I have this 29th day of August, 1977, mailed two copies of the attached Brief to Mark A. Kaplan, Esq., Suite 305, Burlington Office Center Building, 109 South Winooski Avenue, Burlington, Vermont 05401, counsel for Appellant, postage prepaid.

  
JEROME J. NIEDERMEIER  
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